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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

Appellee,

versus

NEW ORLEANS PUBLIC SERVICE INC.,

Appellant.

On Appeal from the Supreme Court of the State of Louisiana.

Brief for Appellant, New Orleans Public Service Inc.

CHARLES ROSEN,
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MONTGOMERY-KINGSBURY PRINTING CO. INC., 420-422 CHARTRES, N.O.

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I.

The opinion in the Supreme Court of Louisiana is reported in *City of New Orleans v. New Orleans Public Service Inc., 168 Louisiana Reports 984, (123 Southern Reporter 648).*

II.

Paragraph I of Rule 12, having been complied with, reference is made to the printed statement as to jurisdiction on appeal.

Inasmuch, however, as Appellee has filed a statement against the jurisdiction asserted by us and this Honorable Court, as we have been advised by the Clerk thereof, has postponed further consideration of the question of jurisdiction to hearing on the merits, it may not be amiss to enlarge on this question.

The statutory provision sustaining the jurisdiction of the Court herein is fully set out in our printed statement as to jurisdiction on appeal and we respectfully refer your Honors thereto.

The City of New Orleans was incorporated by Act 159 of the General Assembly of the State of Louisiana, Session of 1912, and was therein granted "all powers, privileges and functions which, by or pursuant to the Constitution of this State, have been, or could be, granted to or exercised by any city."

> "An ordinance of a city fixing rates for water power supplied from a canal owned and maintained by the city, is a statute of the state in this sense."
>
> *King Mfg. Co. v. Augusta, 277 U. S. 100.*

> "A city ordinance is a law of the State within the meaning of Sec. 237 of the Judicial Code as amended, which provides a review by writ of

error where the validity of a law is sustained by the highest court of the State in which a decision in the suit could be had. Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 555."

Zucht v. King, 260 U. S., 174, at P. 176.

"The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purposes of our jurisdiction, as an act of legislation proceeding from the lawmaking power of the State; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution; and any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State within the meaning of Judicial Code, Sec. 237, which confers jurisdiction upon this court. Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 555, and cases cited."

Reinman v. Little Rock, 237 U. S. 171, at P. 176.

"This court has jurisdiction under Sec. 237, Judicial Code, to determine whether there is a contractual obligation which plaintiff in error is entitled to enforce without its being impaired by the operation of subsequent legislation enacted by or under the authority of the State."

Louisiana Ry. & Nav. Co. v. New Orleans, 235 U. S., 164.

"We think that it sufficiently appears that this question was raised in the state court, and as the state court gave effect to the repealing resolution the case is properly here. It is therefore the duty of this court to determine for itself whether a

contract existed and whether its obligation has been impaired. Douglas v. Kentucky, 168 U. S. 488, 502; St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 148; Grand Trunk Western Ry. Co. v. South Bend, 227 U. S. 544, 551; Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 556; Louisiana Railway & Navigation Co. v. New Orleans, decided this day, *ante*, p. 164."

N. Y. Electric Lines v. Empire City Subway, 235 U. S. 179, at P. 186.

"A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the State, is a state law within the meaning of the Federal Constitution. New Orleans Water Works v. Louisiana Sugar Co., 125 U. S. 18, 31; Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 258, 266; St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 148; Northern Pacific Railway v. Duluth, 208 U. S. 583, 590; Grand Trunk Ry. v. Indiana R. R. Comm., 221 U. S. 400, 403; Ross v. Oregon, 227 U. S. 150, 162.

"And any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the pertinent clause of Sec. 709, Rev. Stat.; Judicial Code, Sec. 237; which confers jurisdiction on this court. Williams v. Bruffy, 96 U. S. 176, 183."

Atlantic Coast Line v. Goldsboro, 232 U. S. 548, at P. 555.

"In cases arising under the contract clause of the Federal Constitution this court determines for itself, irrespective of the decision of the state court, whether a contract exists and whether its obligation has been impaired, and if plaintiff in error substantially sets up a claim of contract with allegations of its impairment by state or municipal

legislation, the judgment of the state court is reviewable by this court under Sec. 709, Rev. Stat."

Northern Pacific Railway v. Duluth, 208 U. S. 583.

"We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States."

Walla Walla v. Walla Walla Water Co., 172 U. S. 1, at P. 10.

See also:

Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135;

Fiske v. Kansas, 274 U. S. 380;

Bluefield Co. v. Public Service Comm., 262 U. S. 679;

Nor. Car. R. R. Co. v. Zachary, 232 U. S. 248;

C. B. & Q. Railway v. Drainage Comm'rs., 200 U. S. 561;

Chicago &c., Railroad v. Nebraska, 170 U. S. 57.

We, therefore, respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

III.

STATEMENT OF THE CASE.

On July 27, 1909, the Council of the City of New Orleans adopted Ordinance No. 6032 New Council Series, directing the Comptroller of the City to advertise for sale and to sell at public auction a franchise, right of way and right to construct, maintain and operate a line of street railway i. e., a double track street railway beginning on Lafayette Avenue at the corner of Villere Street and extending on Lafayette Avenue to the intersection of Franklin Avenue, thence along Franklin Avenue to the intersection of St. James Avenue. (See copy of Ordinance, Document 12 of Defendant's Exhibits).

On December 17, 1909, by notarial act before Robert Legier, Notary Public (see copy Document 13 of Defendant's Exhibits) the City of New Orleans, pursuant to public adjudication by the Comptroller, and to the provisions of said Ordinance No. 6032 N. C. S., granted to New Orleans Railway & Light Company a franchise for a street railway in the City of New Orleans from Lafayette Avenue and Villere Street to Franklin Avenue and St. James Avenue, in accordance with the provisions of the aforesaid ordinance, which is copied *in extenso* in said notarial act. Paragraph 10 of Section 2 of said ordinance reads as follows:

> "The purchaser is obligated herein to construct and operate the railway provided for herein within twelve months after the signing of the contract provided for, and to this end, at least one track with the necessary curves, switches, etc., shall be

completed at that time, but the construction of the remainder need not be completed until such time as the purchaser may deem necessary."

Before said line of street railway was constructed on Franklin Avenue, the New Orleans Terminal Company, a steam railroad company, whose tracks ran along Florida Walk, objected to the street railway of the New Orleans Railway & Light Company crossing the railroad tracks of the New Orleans Terminal Company at grade on Franklin Avenue at the intersection of Florida Walk.

The City, being of opinion that the general public interest would be best subserved by the tracks of the New Orleans Railway & Light Company not crossing at grade, but that the said tracks should cross the tracks of the railroad company on a viaduct, and the Railway Company being satisfied to build such a viaduct, the Council of the City of New Orleans, on March 8, 1910, adopted Ordinance No. 6445 N. C. S. (Document 17 of Defendant's Exhibits, reprinted herein in Appendix) which directed and required the Railway Company to construct, subject to the approval of the City Engineer, a viaduct

"approximately on the center line of Franklin Avenue at and in the vicinity of the Florida Walk intersection, the said viaduct to embrace earthen embankment approaches of such height and width as will not exceed the neutral ground space on Franklin Avenue nor obstruct the roadways on said avenue."

The viaduct, which is of trestle construction, or, in other words, the track structure, being built on piles, was constructed in the year 1910, and thereafter, in Feb-

ruary of 1914, W. J. Hardie, then City Engineer, and Hon. E. E. Lafaye, then Commissioner of Public Property, approved a plan of the Railway Company for the earthen embankment or fill on said viaduct, and said embankment or fill was constructed. (See Plan, Document 1 of Defendant's Exhibits). The viaduct, since its construction in 1910, has been and still is, in operation.

The viaduct and its earthen embankment approaches, at the time of their respective construction, did not exceed the neutral ground space as it then existed on Franklin Avenue, nor did it obstruct the roadways thereon. At the time of the construction of the viaduct and at the time of the construction of the earthen embankment, the roadways on Franklin Avenue were not paved. They were paved in 1927, after the adoption of Ordinance No. 9375 C. C. S., hereinafter referred to; and in paving said roadways, the width of the sidewalks was increased and the width of the neutral ground narrowed thereby, throwing a part of the earthen embankment into what would have been roadway.

New Orleans Public Service Inc., appellant herein, acquired the rights of New Orleans Railway & Light Company in and to the franchise aforesaid by Special Master's deed in the matter of *New York Trust Company v. New Orleans Railway & Light Company*, No. 16,953 In Equity, Consolidated Cause, United States District Court for the Eastern District of Louisiana. (See Admission Tr. P. 151).

In 1926, petitions were addressed to the Commission Council of the City of New Orleans asking, for various

reasons, that the viaduct be demolished. The Council caused an investigation to be made to ascertain the condition of the structure. The report made to the Council indicated that the viaduct was becoming unsafe, though not so much so as to require the immediate cessation of all traffic over it. On November 16, 1926, the Commission Council of the City adopted Ordinance No. 9375 C. C. S. (Tr. P. 9) ordering appellant to remove the viaduct; to construct, operate and maintain a double line of tracks for the operation of its cars at street level along Franklin Avenue and across Florida Walk; and that the work of dismantling and removing said viaduct should be completed within one year after the passage of said ordinance.

Appellant refused to comply with said ordinance and the City brought suit (See Petition, Tr. P. 1).

The grounds chiefly relied on by the City for the demolition of the viaduct are

(1) That is was not constructed in accordance with the provisions of Ordinance No. 6445 N. C. S.;

(2) That it has deteriorated and has not been maintained in a safe and proper manner and its use has become dangerous to the public; and

(3) That, as constructed, it permits of the construction of but one street car track thereon, which is insufficient for the requirements and needs of the people in that section using street railway service.

Appellant resisted the suit of the City on the grounds, among others, (See Answer, Tr. P. 10) that the viaduct had been constructed in accordance with the provisions of said Ordinance No. 6445 N. C. S.; that the viaduct had not become dangerous and had been maintained in a safe and proper manner; that the said street car line is and has always been entirely sufficient for the requirements and needs of the people of that section; that Appellant's predecessor in title of the franchise had been by Ordinance No. 6445 N. C. S. directed and required in the interest of public safety to construct said viaduct; that the viaduct was constructed at a cost of approximately $58,000.00; that the viaduct was required to be built over the tracks of the New Orleans Terminal Company (now Southern Railway Company) because at that point a grade crossing was dangerous by reason of the fact that there are eight steam railroad tracks almost continually used by said Southern Railway and other companies for the switching and operation of trains and cars during the day and the night; that there is no need whatever now to require the destruction of said viaduct and to require Appellant to cross eight tracks of the Southern Railway Company at grade crossing, which would not only be a needless expense involving a cost in excess of $135,000.00 (testified to be at $137,000.00) besides the loss of the $58,000.00 already expended by Appellant's predecessor, but would subject the Appellant and the users of said street railway line to the grave hazards and dangers of grade crossing accidents which the viaduct was intended to and does eliminate; that there is and was no justification for the passage of Ordinance No. 9375 C. C. S. requiring the demolition of the viaduct and that appellant should rebuild its

tracks across the Southern Railway Company tracks at grade; that the passage of said ordinance was unjust,arbitrary and oppressive; that it was not a legitimate exercise of the police power of the City and not required by any consideration of safety to the public; on the contrary, the demolition of the viaduct and the requiring of appellant to cross said Southern Railway Company tracks at grade would introduce the grave hazards and dangers which the viaduct has all these years eliminated; that the said ordinance was passed not in the interest of public safety but in order to satisfy certain property owners who considered that their property was being damaged by the presence of the viaduct and for no other adequate reason; that appellant's predecessor was required by the City to build said viaduct originally at a heavy cost in order to obviate the dangers of a grade crossing and to now require defendant to demolish the viaduct, which the City itself ordered should be built and to establish a grade crossing is not a legitimate and proper exercise of the police power of the City, but an arbitrary exercise thereof, utterly illegal, and a deprivation of defendant's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and an impairment of the obligation of its contract rights with the City, in violation of Section 10 of Article I of the Constitution of the United States.

On the trial of the case, without any written reasons the District Court rendered judgment (Tr. P. 17) in favor of the City in accordance with the prayer of the petition. On appeal therefrom, the Supreme Court of Louisiana affirmed the judgment (Tr. P. 161; 168 Louisiana Reports

984) and in due course denied a rehearing (Tr. P. 166); hence this appeal (Tr. P. 166-167).

IV.

SPECIFICATION OF ERRORS.

The Supreme Court of Louisiana erred in holding

(a) That the provisions of Ordinance No. 9375 C. C. S., requiring Appellant to demolish the viaduct which the City of New Orleans ordered should be built, and requiring Appellant to establish a grade crossing, was a legitimate and proper exercise of the police power of the City of New Orleans and was not violative of the Fourteenth Amendment, Section 1, of the Constitution of the United States, as depriving Appellant of its property without due process of law;

(b) That said Ordinance No. 9375 C. C. S., requiring the demolition and removal of the viaduct was not an impairment of the obligations of Appellant's contract rights with the City of New Orleans and was not violative of Section 10 of Article I of the Constitution of the United States.

V.

ARGUMENT.

Summary of Argument.

Considering (1) that by virtue of its franchise and the ordinance requiring the construction of the viaduct, Appellant has a vested right therein; (2) that the viaduct was required by Ordinance No. 6445 N. C. S. to

be constructed in the interest of public safety and at a cost of approximately $58,000.; (3) that it was constructed in accordance with the terms and provisions of said ordinance; (4) that the encroachment of the earthen embankment or fill of said viaduct was caused by the City itself in taking part of the roadway for sidewalk purposes and part of the neutral ground for roadway purposes, thereby narrowing the neutral ground and which encroachment could have been eliminated by the City ordering part of said fill removed; (5) that the viaduct has not deteriorated and has been maintained in a safe and proper manner and the use thereof has not become dangerous to the public; but even if it has deteriorated, it can be repaired; (6) that although it does permit of only one track thereon, yet one track is amply sufficient for the needs and requirements of the people using street car service in that section; (7) and that to require Appellant to take down said viaduct and to require it to rebuild its tracks so that its street car line should cross eight steam railroad tracks at grade, at a cost of approximately $137,000. in addition to the loss of the $58,000. now invested in the viaduct and to subject Appellant and the users of said street railway line to the grave hazards and dangers of grade crossing accidents, which the viaduct was intended to eliminate and has all of these years eliminated, the conclusion is inevitable that the passage of Ordinance No. 9375 C. C. S., requiring the demolition of the viaduct and that Appellant should rebuild its tracks across eight steam railroad tracks at grade was unjust, arbitrary and oppressive and was not passed in the interest of public safety, but in order to satisfy certain property owners who consider that their property is being damaged by the pres-

ence of said viaduct, and for no other adequate reason; and that the passage of said ordinance presents the question as to whether the City of New Orleans has stepped outside the domain of the legitimate exercise of its police power on to ground forbidden by the due process and contract clauses of the Fourteenth Amendment and Article I of the Constitution, respectively. We, therefore, hope to demonstrate an encroachment on Federal guarantees in that:

Ordinance No. 9375 C. C. S. bears no direct, real or substantial relation to any phase of the public safety or welfare; its passage was unjust, arbitrary and oppressive and not a legitimate exercise of the police power of the City; and is, therefore, invalid, a deprivation of Appellant's property without due process of law and an impairment of the obligation of Appellant's contract rights with the City.

ARGUMENT.

A mere reading of Ordinance No. 6445 N. C. S., shown in the Appendix herein, clearly shows that the viaduct was constructed to subserve the general public interest by the said tracks not crossing at grade and the uncontradicted testimony is that the value or cost of the viaduct now stands at $58,189.00. (See testimony Mall Tr. P. 128).

The City made no attempt to show or to prove that the viaduct was not constructed in accordance with the terms and conditions of Ordinance No. 6445 N. C. S., except its attempt to show that the embankment or fill

encroaches on the lower side paved roadway. In fact, the City could not show or prove that the viaduct was not constructed in accordance with the terms and conditions of said ordinance, because the embankment or fill was constructed under plans approved by the then City Engineer and the then Commissioner of Public Property; it did not exceed the then neutral ground and the present encroachment was brought about by the City itself. Franklin Avenue, at the time of the placing of the embankment or fill on the viaduct, was and still is 128 feet wide from property line to property line and the neutral ground, at that time, was 68 feet wide, with 30 feet on each side from the neutral ground to the property line. The fill at its widest part, on the upper side of Franklin Avenue, was approximately 12 feet from the edge of the neutral ground, and on the lower side, the fill was approximately at the edge of the neutral ground. The fill occupies the same position to-day as it did in 1914; but when in 1927 the City paved Franklin Avenue, it made a 10 foot sidewalk and a 28 foot roadway, 38 feet in all, on the upper side, taking 8 feet off the neutral ground, and made a 12 foot sidewalk and an 18 foot roadway, 30 feet in all, on the lower side. Making a 12 foot sidewalk on the lower side, naturally left only 18 feet of roadway. About the center of the viaduct it crosses a canal known as the Florida Walk Canal. Although the upper roadway is 28 feet wide, the bridge crossing this canal is 24 feet wide. The roadway on the downtown side is now 18 feet and the width of the bridge crossing the canal is 19 feet. (See testimony of Mall, Tr. P. 129). If a 19 foot bridge is ample to take care of vehicular traffic, it is likewise

reasonable to suppose that an 18 foot roadway at that point is likewise sufficient to take care of such traffic. However, if it is not sufficient, the City, instead of ordering the entire viaduct down merely because of this narrowing of the roadway due to the fill or embankment, could have ordered Appellant to remove that part of the fill necessary to widen the roadway.

The City says that the viaduct has deteriorated, has not been maintained in a safe and proper manner and is, therefore, dangerous. Two witnesses were produced by the City to prove this, to-wit, Godat, Bridge Engineer of the City, and Wyler, Assistant Engineer, Street Construction Department.

The viaduct is of trestle construction, that is, the track structure is built on piles driven into the ground, beginning with three pile bents and as the slope of the viaduct increases in height it has four pile bents. Extending crosswise over each row of piles is a 12 inch by 12 inch cap; then longitudinally over these caps are two 7 inch by 14 inch stringers on each side, staggered, so that four 7 inch by 14 inch stringers always extend over two bents or three rows of piles; crosswise on top of these stringers cross-ties are placed and then on these cross-ties the rails and guard rails are laid.

Godat, witness for the City, says he made an inspection of the viaduct in 1926; that he found the viaduct unsafe, primarily on account of the condition of

the bents which support the stringers and the track structure itself; in some bents, the caps had rotted and in others the piling had rotted. He made another inspection on December 31, 1928, and January 2, 1929, and found the condition improved over the inspection of 1926, in that some of the bents formerly considered dangerous, had been removed, but he found other bents dangerous; the bridge proper, that is, the steel work, was in very good condition; the track system was in fair state of repair with the exception of certain ties which had begun to rot; the stringers were good and the caps, with three exceptions, were good. On cross-examination, he testified that he had made a report of his 1926 inspection (which report was not sent to Appellant) to the Commissioner of Public Utilities. The viaduct was considered by him safe temporarily and with the correction of a certain defect at bent 28 (which defect at bent 28 was corrected), the structure would be safe for the operation of cars. He also testified that certain of the piles showed evidence of cracking, meaning to convey the impression that these cracks were stress or load cracks.

Wyler, witness for the City, testified that he inspected only half of the viaduct and found that bent 13 only was dangerous.

Mall, engineer and witness for the defendant, testified that the viaduct had been constructed in accordance with an approved design and that he had seen innumerable structures over the country designed in the same way; that the deck structure, that is, the rails and ties and the part that can be seen on top, is gone over once a week by

a track inspector, who notices the parts for which he is responsible; the substructure is inspected by Appellant's engineers, giving it casual inspection once a month, and a detailed general inspection by these engineers is made quarterly; that the cars operated over the viaduct by Appellant weigh 22 tons, and loaded to their maximum capacity, with every available inch of space occupied, that is, with 175 passengers, whereas the normal or seating capacity of said cars is 52 passengers, the weight of the car with said passengers is 34 tons, or 68,000 pounds. The cars are double truck cars with two trucks with four wheels on each truck, the trucks being spaced 22 feet from center to center; the bent spacing of the viaduct is 15 feet, making the limit of the load on any one bent 50% of the car load or 17 tons or 34,000 pounds. Where the bent is composed of four piles, each pile carries one-fourth of 17 tons or 4¼ tons.

Godat, witness for the City, testified that pile "C" in bent No. 1 was dangerous and because that one pile was dangerous, the entire bent was therefore dangerous. Mall further testified that he had this pile "C" of bent 1 removed, and it showed evidence of heart rot continuing down for a depth of eight feet and with a view of learning what effect that deterioration had on the strength of the pile and what load would be required to cause stress checks in the remaining part thereof, he took a section two feet long, which represented the part of the pile which had deteriorated the most; the pile was approximately 16 inches in diameter; it was split into two parts and each part tested separately; one section required a load of 187,-500 pounds to produce the first evidence of stress cracking

and the other section required a load of 192,500 pounds to produce the first evidence of stress cracking, or a total of approximately 375,000 pounds for the whole pile. In other words, it took a load capacity approximately 33 times the weight of a car loaded to its maximum capacity to produce the first evidence of stress cracking in the pile.

The evidence is conclusive that this pile, which was criticized most severely by Godat, was not dangerous at all. The same can be said with regard to all of Godat's findings and criticisms. Mall further testified that the stringers are renewed when the decay has become extensive, but this at a time when that decay has not reached the point of danger; the caps are renewed in the same way and that the piles likewise are renewed whenever they show such evidence of decay; all of which is done in accordance with the monthly and quarterly inspections; that none of the piles in the structure showed evidence of stress checks or cracking, but what they do show is weather checking, which has no bearing on the strength of the pile.

It was an undisputed fact that in the nineteen years since the viaduct had been constructed and in operation, not one single accident had been due to any defect in the viaduct.

From the evidence of Mall and Guillot, engineers for Appellant, this viaduct has been maintained in a safe and proper manner and the use thereof had not become dangerous to the public. If there were or are any defects in this viaduct, which the City's engineers deem unsafe, the City can order these defects corrected at once and there is no

need or reason for the demolition of the entire structure because a few members or timbers of the structure, which can be easily renewed or repaired, are deemed to be defective or dangerous by the City's engineers.

Although the viaduct, as constructed, permits of the construction of but one street car track thereon, this one street car track is sufficient for the requirements and needs of the people of that section of the City. The Supreme Court of Louisiana found that the contention of the City that the viaduct should be removed because it is so constructed is scarcely sufficiently supported by the evidence to justify the removal of the viaduct; that it did not appear to the Court that the population has so increased as to call for the removal of the structure in order to provide for double tracks.

The City contended that because street cars of this line pass over a series of tracks owned and operated by the Louisville & Nashville Railroad Company at grade, crossing the viaduct over the Southern Railway Company's tracks fails to provide any real protection from the dangers that might be encountered by reason of grade crossings. This contention is so untenable that it hardly merits argument. It is obvious that if there are two series of railroad tracks over which street cars run, both of which were dangerous to street car traffic, and one of these grade crossings was eliminated by the construc-

tion of a viaduct, it necessarily would cut down the danger of accident by 50%. Moreover, the same conditions do not exist at both crossings. At the L. & N. crossing, there are only three tracks, two main lines tracks and one switch track, while at the Southern Railway crossing, there are eight tracks, two main line tracks and six switch tracks, the danger at the latter crossing being approximately three times the danger at the L. & N. crossing. Exhibits D-1 and D-2 (Documents 5 and 6 of Appellant's Exhibits) show that for the period September 1, 1926, through September 30, 1927, 24,136 trains of the Southern Railway Company crossed Franklin Avenue, or an average of 61 trains hauling 683 cars per day; that for the period from October 1, 1927, to September 30, 1928, 23,028 trains crossed Franklin Avenue, or an average of 63 trains per day, hauling an average of 642 cars.

If it was necessary in the interest of public safety to construct the viaduct in 1910 by reason of the dangers existing at the Southern Railway crossing, and the viaduct was not required to be extended across the railroad tracks of the L. & N. Company by reason of the fact that there was no such continuous switching and operation of trains and cars thereover as was at said Southern Railway crossing, then we say that there is now no justification for the demolition of the viaduct and the requiring of defendant to cross said Southern Railway tracks at grade crossing, which would introduce the grave hazards and dangers which the viaduct has all these years eliminated. There is now and was no justification for the passage of Ordinance 9375 C. C. S. requiring the demolition of the viaduct

and for requiring Appellant to rebuild its tracks across the Southern Railroad Company tracks at grade. The passage of said ordinance was unjust, arbitrary and oppressive, not a legitimate exercise of the police power of the City, and not required by any consideration of safety to the public; but the ordinance was passed in order to satisfy certain property owners who consider that their property is being damaged by reason of the viaduct, and for no other adequate reason.

When the removal of this viaduct was first agitated in 1926, the matter was referred to Mr. Hall, Commissioner of Public Utilities of the City of New Orleans, and as will be seen by his special report under date of August 3, 1926, contained in the special proceedings of the Commission Council of the City of New Orleans of that date. (Document 14 of Appellant's Exhibits). He gives a report of the number of steam railroad cars handled on the tracks which run under this viaduct and he says:

> "It is a recognized fact all over the country that grade crossings are great elements of hazard and millions of dollars are being expended in their elimination, and it is being done as rapidly as finances will permit. It is my understanding that our City government recognizes the principle of elimination of grade crossings, and that it is their desire to adhere, wherever possible, to the opinions and advice as advanced by our most eminent engineers in matters of this character."

He further says:

> "I might state that at the present time there are 137 street cars per day operated over this via-

duct, this line of street cars handling over five million passengers the past fiscal year, a conservative estimate in my opinion being that about one-third of this amount of passengers travel over the viaduct each year. Operations over the viaduct by the street cars are on about six minutes average schedule the day around and there is no doubt but that if such operation was forced over a grade crossing that such schedule would of necessity be considerably lengthened as a result of the increased delays thereby caused."

At the meeting of the Commission Council of August 17, 1926, as will be shown by the official proceedings thereof (Document 14-A of Appellant's Exhibits) Commissioner Hall again stated:

"It is the opinion of the Council so expressed in conference that we go on record as advocating the removal of grade crossings wherever practicable and wherever we deem same necessary, as streets are ordered paved. With this expression from the Council and the paving of Franklin Avenue being in progress, at the present time, it will be my pleasure to submit at a later meeting an ordinance to remove the Franklin Avenue viaduct and to also submit an ordinance to provide for the construction by the steam railroads a viaduct to take care of this grade crossing at Franklin Avenue. * * * This is a principle recognized by all municipalities and I am certainly happy to make this statement and see the Council go on record as favoring this forward and progressive step."

At the time of the hearing of Ordinance No. 9375, C. C. S., which was Calendar No. 9709, before the Commission Council, on November 2, 1926, as will be seen by

the official proceedings thereof (Document 4 of Plaintiff's Exhibits) Commissioner Hall again stated

> "that in view of the fact that a general policy ordinance relative to viaducting steam railroad tracks would be introduced to-night, he thought the matter ought to be held in abeyance until that ordinance was disposed of."

Again, on November 16, 1926, at the time the Commission Council adopted Ordinance No. 9375 aforesaid, as will be seen by the official proceedings of date November 16, 1926 (Document 10 of Appellant's Exhibits) Commissioner Hall again stated:

> "I beg to report favorably on Calendar 9799, an ordinance directing and requiring all railroads operating within the City limits of the City of New Orleans to viaduct their tracks at all grade crossings where density of traffic renders grade crossings dangerous and hazardous and where the streets are ordered paved by the City, and providing a penalty for the violation thereof."

and, again, in the same proceedings on the hearing on Ordinance Calendar 9799, just mentioned, Mayor O'Keefe stated:

> "That the Council had been and are opposed to grade crossings. * * *"

Thereafter, when Ordinance Calendar No. 9709, which became Ordinance 9375, C. C. S., was called up for adoption, Commissioner Klorer voted "No" "for the reason that in my judgment the proposed removal of the viaduct is prejudicial to public safety."

From the above and foregoing, it will be readily seen that the Commission Council was not in favor of grade crossings and that Ordinance No. 9375, which was adopted November 16, 1926, was adopted only because it was generally understood and held by the Commission Council that an ordinance would be adopted compelling the steam railroads to viaduct their tracks. We feel safe in saying that to this date no such ordinance has been adopted and that for the simple reason that the construction of viaducts by steam railroads in the City of New Orleans would necessitate the expenditure of a very large amount of money, of which, as stated by the City in Article XI of its petition, the City would have to contribute, under Act 38 of 1924, one-half the cost thereof, and the City is not financially able to contribute so large an amount out of its alimony. Almost simultaneously with the trial of this cause, which began on January 7, 1929, to-wit, on January 5, 1929, Commissioner of Public Utilities Hall and City Engineer Vallas were holding conferences with the officials of the Southern Railway Company looking towards the elimination of grade crossings at City Park Avenue and Canal Boulevard, in this City, as shown by the New Orleans States and the Item-Tribune of Sunday, January 6, 1929, being found at Documents 16 and 17 of Appellant's Exhibits.

The Commission Council may be vested with full and complete authority and control over the streets and may have full power, authority and control to regulate the operation of the street railway lines of Appellant; but we contend that where the City by Ordinance No. 6445, N. C. S., directed and required the predecessor of this defendant to

construct the said viaduct, which stands on defendant's books at a valuation of approximately $58,000.00, and where said viaduct has been maintained and operated with due regard to safety and it has proved entirely adequate and sufficient for the transportation of the users of said line, and where there is and was no justification for the passage of Ordinance 9375, C. C. S., requiring the demolition of said viaduct, and requiring Appellant to rebuild its tracks across said Southern Railway Company tracks at grade crossing, which would only be a needless expense involving a cost in excess of $135,000.00 in addition to the loss of the value of said viaduct, as aforesaid, the passage of said ordinance was unjust, arbitrary and oppressive and was not a legitimate exercise of the police power of the City, but an arbitrary exercise of this power, a deprivation of defendant's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and an impairment of the obligation of its contract rights with the City, in violation of Section 10 of Article I of the Constitution of the United States.

In *City of New Orleans v. Great Southern T. & T. Co., 40 Louisiana Ann., 41*, the defendant purchaser was granted the right by ordinance of the City of New Orleans to construct and maintain a line of telegraph through the streets of the City. Under said ordinance, defendant constructed and maintained telephonic lines through the streets, built according to the directions of the Administrator of Improvements and with his approval and complied in all respects with the terms of the ordinance. Some four years thereafter, the City Council adopted another ordi-

nance to regulate and control the erection and maintenance of poles for supporting wires of telephones within and on the streets of the City, one of the provisions of which required the payment of $5.00 per annum per pole for every pole erected or at present in use. The City claimed that the provisions of the ordinance was a regulation or condition imposed upon the maintenance of the poles, an exercise of the privileges which the City had a right to impose and without compliance with which the defendant could not lawfully continue to maintain and exercise them. The Court said:

> "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well recognized doctrine of the authorities since the Dartmouth College Case, 4 Wheat. 518."

In *East Louisiana R. Company v. City of New Orleans, 46 La. Ann., 526,* the City of New Orleans by ordinance, granted to plaintiff the privilege to construct and operate a railroad with steam power through certain streets of the City. The plaintiff company accepted the grant and proceeded to comply with it and expended over $3,000.00 in work. The City, believing the ordinance to be null and void, adopted another ordinance, repealing the ordinance granting it. The Court said:

> "Having granted the franchise to plaintiffs and it having been accepted, the contract was perfected. New Orleans v. Telephone & Telegraph Company, 40 Ann. 41."

In *Grand Trunk Western Ry. Co. v. South Bend*, *227 U. S., 544*, where the City of South Bend granted a franchise to the railroad company permitting the company to lay a double track through one of its streets and the railroad company constructed a single track part of the way, but subsequently when it decided to complete the laying of the double track, the City passed an ordinance repealing the franchise insofar as it permitted the laying of the double track through its streets. The Court said:

> "The ordinance of South Bend, Indiana, of 1868, permitting a railway company to lay a double track through one of its streets, and which had been availed of as to part of the distance, was a valid exercise of delegated legislative power, and no power to alter or repeal having been reserved, a subsequent ordinance repealing the franchise as to the double track was not a valid exercise of the police power to regulate the franchise, but an impairment of the contract and unconstitutional under the contract clause of the Constitution."

The court further stated in discussing this case:

> "Inconvenience natural to the proper use of a properly granted franchise cannot be made the basis of exercising the police power to destroy the franchise."

In the case at bar, the City is seeking to abrogate a part of the franchise granted to defendant for the Villere extension and to cause the destruction and removal of a viaduct erected and constructed under the direct order and

authority of the City, and which is being used in the customary manner. This Court in the above case further said:

> "Tracks laid in a street under legislative authority become legalized, and when used in the customary manner cannot be treated as unlawful either in maintenance or operation."

In *Owensboro v. Cumberland Telephone Company, 230 U. S., 58*, the City of Owensboro granted a franchise to the telephone company and with it the right to use the streets for the erection and maintenance of its poles and wires. The franchise was granted by ordinance of the City. Under that ordinance, the grantee proceeded to erect its plant and to place its poles and wires upon the streets and it and its successors and assigns had ever since maintained and operated a telephone system. Some twenty years afterwards, the City passed an ordinance requiring the telephone company to remove from its streets all of its poles and wires within a reasonable time after the passage of the ordinance and upon failure to so remove, the Mayor was directed to have them removed. The court said:

> "If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance passed upon legislative power without violating the prohibition placed in the Constitution for the protection of property rights."

In the case at bar, the City is seeking to destroy part of the street car franchise by compelling the removal of the Franklin Avenue viaduct. The police power of a municipality cannot be used to revoke or repeal an ordinance under which property rights have been granted

as in this case and thus destroy such property rights. The court, in the *Owensboro* case, above referred to, further said:

> "A reservation to alter or amend in a municipal ordinance granting rights in the streets to a corporation to carry on a public utility, as the necessities of the city demand, is simply a reservation of police control incidental to the unabridgeable police power and does not reserve a right to revoke or repeal the ordinance itself."

In *City of Chicago v. Pittsburg C. C. & St. L. Ry. Co., 91 N. E. Reporter, 422,* the City of Chicago passed an ordinance in 1872 granting to the defendant's predecessors the right to lay railroad tracks on certain streets on the condition that the railroad company should erect and maintain viaducts over its tracks at certain streets for the public safety. The railroad company laid its tracks and complied with the terms of the ordinance by erecting the viaducts. In 1901, the City passed another ordinance to compel the railroad company to elevate its tracks. The Court said:

> "Railroad corporations are subject to police regulations in the interest of the public safety and welfare, and power has been given to cities to do certain specific things in the exercise of that power and a general authority to pass and enforce all necessary police ordinances, and to pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to them. But the Legislature cannot, under the guise of police regulations, arbitrarily invade personal rights or private property. There must be some obvious and real connection between the actual provisions of police measures and their assumed pur-

pose. Counsel also lose sight of the rule of law that where power to legislate on a given subject is conferred on a municipal corporation, and the details of the legislation are not prescribed by the Legislature, it is implied that the power will be reasonably exercised. Assuming that the elevation of railroad tracks comes within the general police power with which cities are invested, the power is given in general terms and an ordinance passed for that purpose, must be reasonable or it will be pronounced invalid."

* * * * * *

"The objects of viaducts and elevated tracks are the same—i. e., to eliminate grade crossings and the danger, delays, and inconvenience connected with them—and there is nothing tending to show that elevated tracks would be any safer for the public than viaducts. The viaducts had been built in pursuance of the ordinance of 1872 at great expense, and other viaducts were provided for by that ordinance. If they secured the public safety, an ordinance requiring the defendant to tear them down and elevate its tracks against its will would necessarily be held unreasonable and void on the same ground as the decision in Hawes v. City of Chicago, *supra*. It was there held to be unreasonable, unjust, and oppressive to compel an owner to construct and pay for a wood sidewalk, and, when it was in substantially as good condition as when first built and in all respects safe, convenient, and sufficient for public use and travel, to take it up, throw it away, and put down a different sidewalk at his own expense. The city having provided for the public safety, according to the judgment of the city authorities when the original ordinance was passed, by the viaducts specified therein and the requirement for the contruction of others as called for, an ordinance requiring them to be torn down without any change in conditions would not have been a

legitimate exercise of the police power, and it does not appear that any new contingency had arisen requiring or authorizing any such action."

From the above quoted decision, it will be readily seen that the City of New Orleans, having in the interest of public safety, by Ordinance No. 6445, N. C. S., ordered and directed the defendant's predecessor to erect a viaduct, the passage of Ordinance No. 9375, C. C. S., requiring this viaduct to be torn down, when there has not been shown to be any change in the conditions existing at the Southern Railway crossing, is not a legitimate exercise of police power and the City Council, under the guise of police regulations, cannot abitrarily invade personal rights or private property, and Ordinance 9375, C. C. S., should be, by this Honorable Court, held invalid, just as the Supreme Court of Illinois held the ordinance invalid in the case from which we have quoted above.

In *State v. Kansas City Terminal Railway Co., 168 S. W. Reporter, 1144*, the court said:

"On the construction of a union station in a city, certain property owners formed a corporation to build a viaduct along a street over defendant's tracks at a point where the street was about 60 feet wide. The street had a general width of 80 feet, but for a portion of the distance, including the space to be occupied by the viaduct, was of various widths from 60 to 70 feet. By permission of the city the viaduct was constructed to the full width of the street, and after this, the station having been completed, an ordinance was adopted widening the street to 80 feet, and another ordinance passed requiring defendant terminal railway company to widen the viaduct, so as to make it conform to the

new width of the street. Held that, in the absence of an actual test of the capacity of the streets leading to and in the immediate vicinity of the station, to accommodate the traffic, the latter ordinance was void for unreasonableness."

In the case at bar, there has been no showing that a roadway 18 feet wide on the lower side of the viaduct is not sufficient to take care of the traffic using that roadway. While the roadway itself on both sides of Franklin Avenue on the river side of the viaduct is 28 feet wide, the roadways on both sides of Franklin Avenue on the lake side of the viaduct are only 24 feet wide. Moreover, the bridges belonging to the City across the Florida Walk Canal, which flows under the very center of the viaduct, are only 19 feet wide on the lower side and 24 feet wide on the upper side roadway. If the bridge on the lower side is only 19 feet wide and is able to take care of the traffic, then a roadway 18 feet wide on the lower paved roadway is likewise sufficient to take care of automobile and vehicular traffic.

In *City of Chicago v. New York, C. & St. L. R. Co., 216 Fed., 734 at P. 738*, the Court said:

"Two distinct elements, in our opinion, appear in the 1909 ordinance. One is a grant of a property right. Under Illinois law a railroad company has authority to locate its right of way, including a way upon or across streets, without consulting the city. That authority flows from the sovereign. The only limitation is that construction of the railroad upon or across a street shall not be undertaken without the assent of the city. When the city assents, the property right becomes as completely vested as if the grant had been directly from

the sovereign. C. & W. I. R. Co. v. Dunbar, 100 Ill. 110; Tudor v. Rapid Transit R. Co., 154 Ill. 129, 39 N. E. 136. And of course a vested property right cannot be taken away without just compensation or due process of law. Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405. So when Chicago by its assent expressed in the 1909 ordinance completed appellee's title to a right of way across Seventy-Ninth street at the designated place, in latitude and longitude, power was lacking thereafter to destroy or impair the property right by an ordinance of the character of that of 1912."

In *Chicago & N. W. Ry. Co. v. Ochs, 249 U. S. 416 at P. 421*, this Court said:

"Of course, the expense is an important element to be considered in determining whether the requirement is within the bounds of reasonable regulation or is essentially arbitrary, but it is not the only one."

In *Grand Trunk Western Ry. Co. v. South Bend, supra, at P. 556*, this Court also said:

"The ordinance passed in pursuance of the Indiana statute was an entirety. When accepted it became binding in its entirety. If the city has the right to repeal the specific provisions of the contract, it has the like right to repeal the more general grant to lay a single track. If South Bend can do so, every other municipality having granted like rights, under similar ordinances, and affecting every line of railway in the country, can repeal the franchise to use double or single track. On the ground of congestion of traffic, the State's grant and command to operate a continuous road could be nullified by municipal action, to the destruction of

> great highways of commerce, similar in their nature to the street itself. Such consequences though improbable, are rendered impossible by the provision of the Constitution of the United States prohibiting the impairment of the obligation of a contract by legislation of a State, whether acting through a General Assembly or a municipality exercising delegated legislative power."

In its opinion, the Supreme Court of Louisiana cited as authority therefor only two cases, that of *City of Shreveport v. Kansas City S. & G. Ry. Co., 167 La. Repts. 771 (120 So. 290)* and *Chicago & Alton Ry. v. Tranbarger, 238 U. S. 67.*

In the *Shreveport* case, the Court found that:

> "Prior to the institution of this suit, the City Council found, 'as a fact' in a resolution adopted by that body: 'That the piers erected and maintained by the Kansas City Southern Railway Company in Marshall Street for the support of the bridge over said street, encumber said street and prevent and embarrass the use of same and render the same unsafe for travel. That in order to restore to the public the free and safe use of said street, it is necessary that said piers be torn down and removed.' "

There is not a scintilla of evidence, documentary or otherwise, in the record of the case at bar showing that the Commission Council of the City of New Orleans found as a fact that the viaduct prevented and embarrassed the free use of the streets, nor was there any charge in the suit of the City that it did so.

In the *Shreveport* case, the Court found that the charter of the City conferred power on the Council to make and pass such ordinances as are necessary and proper:

> "To regulate and make improvements to the streets, alleys, public squares, wharves and other public property.
>
> "To determine the completion and dimensions of the pavements of the streets, to fix the squaring, and to prevent any encroachment upon or stopping and obstructing the streets, alleys, public squares, levees, public roads, or any part of the landing or port of Shreveport **and to order any object, whatever may be its value which may encumber said places, or prevent and embarrass the free use of same, to be torn down and removed * * * .**"

Commenting on this clause in the charter of the City of Shreveport, the Court stated that in *Agurs v. McKellar, 129 La., 186*, this section of the City charter had been construed and the rights of the City of Shreveport had been defined as follows:

> "The above quoted provision of the charter of the City of Shreveport confers upon the Council two separate and distinct powers: One, 'to prevent any encroachments upon or stopping and obstructing the streets'; and one, to 'order to be torn down and removed any object which may encumber the street or prevent and embarrass the free use of same.' The first of these powers looks to the future. It has reference to all attempts whatsoever at encroaching upon or obstructing the street, be the encroachment or obstruction serious or insignificant, big or small. * * * **The second of these powers has reference to cases where at some time in the past, with or without permission of the City authorities, through inadventure or otherwise,** some object

has been constructed, in whole or in part, upon the street, **and, because of the permission given** or because of peculiar circumstances or, indeed, simply because of the long acquiescence, **whereby conditions have been allowed to develop and interests to grow, it would be inequitable to disturb the existing situation unless the public interest actually required it. In the latter class of cases and in the exercise of this second power, the City Council is authorized to order the object to be torn down and removed if it encumber the street or prevent and embarrass its free use."**

We have been unable to find any provision in the charter of the City of New Orleans conferring upon the Council a power similar to the second of the powers which the Court found to be among the powers granted in the charter of the City of Shreveport.

In the *Shreveport* case, the Court further stated that:

> "No principle of constitutional law is better settled in this country than the principle that neither the Legislature nor the people themselves, much less their servants, can bargain away * * * the public safety * * * ."

In the case at bar, there was no bargaining away of the public safety by the City of New Orleans, and there was no permission of the City authorities granted to defendant's predecessor to erect the viaduct. As heretofore stated in this brief, in the City's petition, it alleged that Ordinance 6445 **"directed and required** the New Orleans Railway & Light Company to construct" the viaduct.

In the *Shreveport* case, the ordinance granting permission to the railroad company to erect the viaduct gave them the right to encroach on the paved portion of the street. There was, therefore, an encroachment of the street from the very time the viaduct was erected. In the case at bar, there was no encroachment of the street contemplated by Ordinance 6445, as that ordinance specifically provided that the viaduct should be constructed approximately on the center line of Franklin Avenue and to embrace earthen embankment approaches as would not exceed the neutral ground space nor obstruct the roadways of said avenue. As heretofore pointed out, when the viaduct was erected, it was erected approximately on the center line of Franklin Avenue and the earthen embankment approaches did not exceed the neutral ground space nor obstruct the roadways. The obstruction of the lower paved roadway was brought about, not by any act of the defendant or its predecessor, but by the act of the City itself in attempting to occupy for street and sidewalk purposes more than the thirty feet of space between the edge of the neutral ground and the property line, as shown by the plan (Document I of Appellant's Exhibits) approved by the City Engineer in 1914.

In the *Shreveport* case, the Court further stated that in the case of *New Orleans Gas Light Company v. Drainage Commission, 197 U. S., 453*, this Court declared that every reason of public policy required that grants in the subsurface of streets shall be held subject to such reasonable regulations as the public safety may require. Our contention is that Ordinance 9375, C. C. S., is not a reasonable regulation of the City, but the passage of that ordi-

nance was unjust, arbitrary and oppressive, and was passed, not in the interest of public safety, but in order to satisfy certain property owners who consider that their property is being damaged by the presence of said viaduct and for no other reason. In the petition presented to the City Council by the property owners and residents of that section, which was offered in evidence, but, which, upon objection of counsel for defendant, the Lower Court refused to permit counsel for the City to file in evidence, one of the reasons stated for the removal of the viaduct was "that the same causes a depreciation in the value of the real estate owned in that locality."

The case of *Chicago &. Alton Ry. Co. v. Tranbarger, supra*, has no bearing on the issues involved herein and is not at all analogous. Of course, it does repeat the well-known principles that neither the contract clause nor the due process clause of the Federal Constitution has the effect of overriding the police power of the State and that the police power embraces regulations designed to promote the public convenience or the general welfare or safety; also that it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without due process of law in the sense of the Fourteenth Amendment, but that is as far as the case goes.

We repeat:

(1) The viaduct was ordered and directed to be constructed under Ordinance 6445, N. C. S., the provisions of which required that the earthen embankment approaches should be of such width as should not exceed

the neutral ground space; the embankment was constructed under plans approved by the City Engineer; the embankment did not exceed the then neutral ground space, and inasmuch as it did not exceed such neutral ground until the City itself sought to narrow same, and inasmuch as the present condition of the lower roadway on Franklin Avenue was brought about by the City itself, the City should not now be heard to say that the viaduct was not constructed in accordance with the terms of the ordinance or that it has been maintained and operated in violation thereof. There has been no showing and no proof offered that the viaduct was not constructed in accordance with the terms of said ordinance or has been maintained and operated in violation thereof;

(2) The viaduct has been maintained in a safe and proper manner and the use thereof has not become and is not dangerous to the public. If there are any defects in this viaduct, or if any deterioration has taken place, which the City's Engineers might deem unsafe, the City can order these defects corrected; and the ordinance of the City, ordering the demolition of the entire structure because a few members or timbers therein might be deemed to be defective or dangerous by the City's Engineers, is arbitrary, unreasonable and oppressive, as there is no need or reason for the demolition of the entire structure where a few members or timbers therein can be easily renewed or replaced;

(3) Under the franchise, Ordinance No. 6032, N. C. S., the defendant does not have to double track that portion of its line operating over the viaduct until it is

deemed necessary by it so to do. Moreover, the evidence does not show that it is necessary for the needs of that section that the viaduct be demolished for the purpose of installing a double track at that point;

(4) There has been no decrease in the number of passengers using said line by reason of any dangerous condition thereof, or by reason of accidents happening thereon. We have conclusively shown that in all the time the viaduct has been in operation, no accident has occurred due to any defect therein, and the wild fears for the safety of passengers using said line, none of whom testified in the case, inasmuch as none of the witnesses who did testify ride the street cars and if they do then only to a very limited extent, are brought about by a desire to see the viaduct removed, not because of any danger to the riding public, but in order to appreciate real estate values;

(5) Although street cars of this line pass over the L. & N. Railroad Company tracks at grade, that is no reason why the viaduct over the Southern Railway tracks fails to provide any real protection from the dangers of grade crossings any more than to say that a street car viaduct over the Southern Railway tracks on Franklin Avenue is ineffective because the street cars on Carrollton Avenue cross the Illinois Central tracks at grade.

(6) If part of the earthen embankment approach to the viaduct, by reason of the widening by the City of the lower roadway and sidewalk in 1927, now encroaches on said paved roadway, the City can order that part of said earthen embankment removed so as to permit

of a 24-foot roadway on the lower side of Franklin Avenue on the side of this viaduct, as the roadway on the lake side of the Southern Railway crossing was made only 24 feet by the City, and because of this slight encroachment, there was no need to order the demolition of the entire viaduct;

(7) In 1910, when this line was built and the franchise granted to defendant's predecessor, the City, in order to eliminate a grade crossing at the Southern Railway tracks, and in the interest of public safety, ordered this viaduct erected and constructed, and to now say that this viaduct should be removed when the same dangers of a grade crossing at said Southern Railway tracks exist, is not a valid exercise of the police power, but an unreasonable, arbitrary, unjust and oppressive exercise thereof. If the City could order this viaduct erected and can now order it removed, when conditions are unchanged, next week or next month or next year, who knows but what it might order the viaduct erected again?

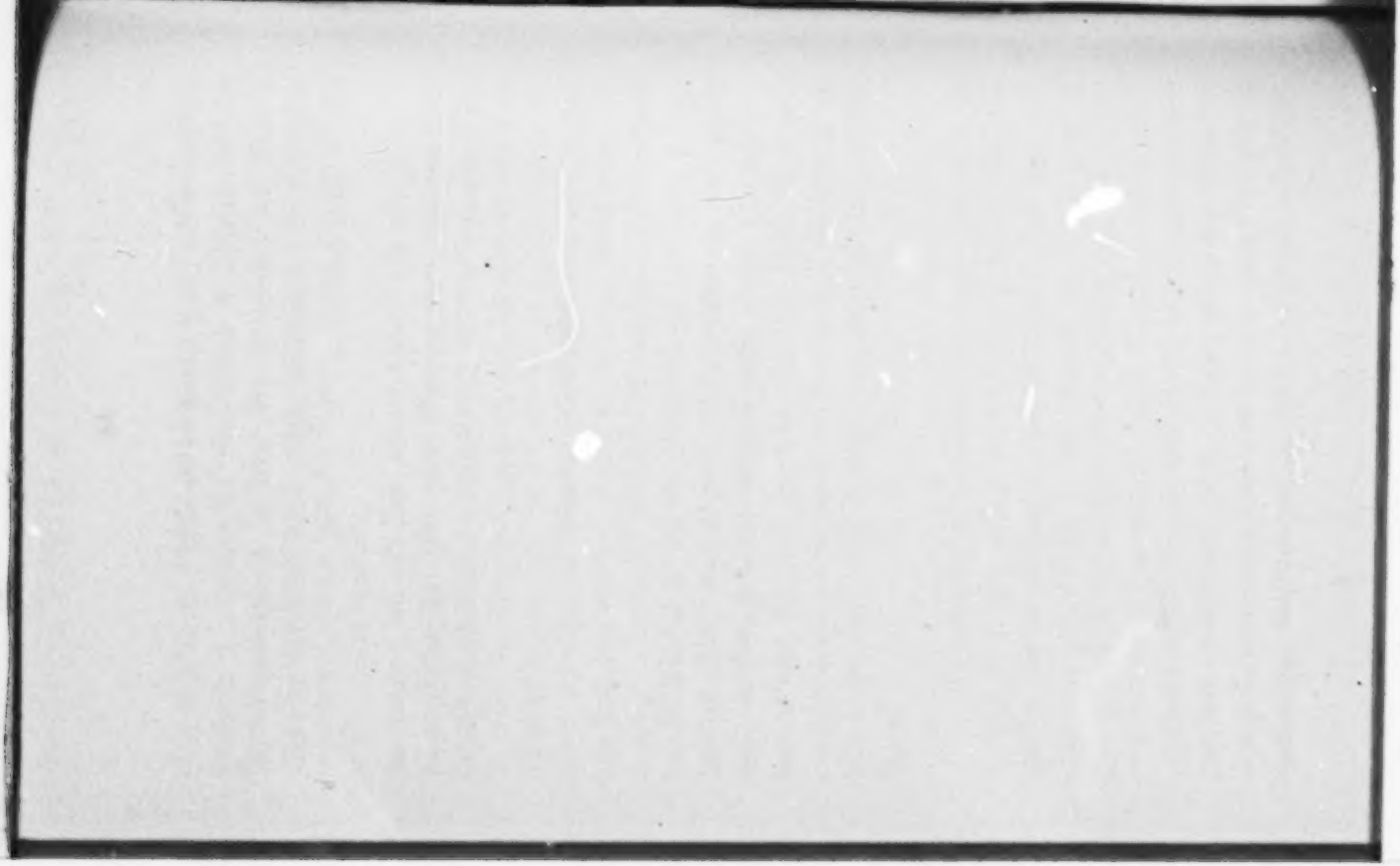
We submit that the ordinance was not passed in the interest of public safety, because public safety does not require the demolition or removal thereof; but that said ordinance was passed for the purpose of satisfying property owners in that section who considered that their property was being damaged by reason of said viaduct and for no other adequate reason; that having ordered and required that said viaduct be erected, and now to require defendant to demolish the same and to establish a grade crossing at the Southern Railway tracks, is not a legitimate and proper

exercise of the police power of the City, but an arbitrary exercise thereof, a deprivation of defendant's property without due process of law, and an impairment of the obligation of its contract rights with the City, in violation of the Constitution.

Under the circumstances, and for the reasons set forth herein, we respectfully pray that the judgment of the Supreme Court of Louisiana be reversed and plaintiff's suit be dismissed at its cost.

Respectfully submitted,

CHARLES ROSEN,
ALFRED CHARLES KAMMER,
Attorneys for New Orleans Public Service Inc., Defendant and Appellant.



APPENDIX.

Mayoralty of New Orleans,
City Hall, March 9, 1910
Calendar No. 8618.

NO. 6445 NEW COUNCIL SERIES

Whereas the New Orleans Terminal Company has objected to the New Orleans Railway and Light Company crossing its tracks at grade on Franklin Avenue, at the intersection of Florida Walk, in connection with the franchise granted by the said New Orleans Railway and Light Company by Ordinance No. 6032, New Council Series, and.

Whereas the general public interest will be best subserved by the said tracks not crossing at grade, but that the said tracks cross the tracks of the New Orleans Terminal Company on a Viaduct; and

Whereas the New Orleans Railway and Light Company is satisfied to build such Viaduct; therefore

BE IT ORDAINED by the Council of the City of New Orleans, That the City Engineer be and he is hereby authorized to approve plans for a Viaduct to be constructed by the New Orleans Railway and Light Company, approximately on the centre line of Franklin Avenue, at, and in the vicinity of the Florida Walk intersection, the said Viaduct to embrace earthen embankment approaches

of such height and width as will not exceed the neutral ground space on Franklin Avenue, nor obstruct the roadways on the said avenue.

Adopted by the Council of the City of New Orleans, March 8, 1910.

GEORGE FERRIER, JR.,
Clerk of Council.

Approved March 9, 1910.

MARTIN BEHRMAN,
Mayor.